Supreme Court, U.S.
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No. 09-962

IN THE

Supreme Court of the United States

LASALLE GROUP INCORPORATED,

Petitioner,

v.

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's rigorous analysis of the evidence and alter ego law does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

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INTRODUCTION

The decision of the Sixth Circuit does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by this Court. In this case, the Trustees of the Detroit Carpenters Fringe Benefit Funds (the "Funds") seek damages against the defendants for breach of their collective bargaining agreements ("CBAs"). The Sixth Circuit found that there was a "mountain of evidence" establishing the defendants were alter egos and also found that the defendants had breached their obligations to pay certain fringe benefits to the Funds. The fact intensive nature of this case, the fact intensive nature of the alter ego doctrine, the equitable judgments made by the Courts of Appeals and District Courts in applying the alter ego doctrine, and the uniform application of the alter ego standards by the various Circuit Courts, all mandate that this case is not appropriate for Supreme Court review.

STATEMENT OF THE CASE AND GOVERNING FACTS

In 2001, The LaSalle Group, Inc. ("LaSalle"), a union company, altered its structure and created Industrial Contracting, LLC ("Industrial"), a non union company, while LaSalle was signatory to a CBA with the Michigan Regional Council of Carpenters, ("MRCC"). The CBA prohibits LaSalle from subcontracting carpentry work to non union contractors. LaSalle and Industrial have substantially identical ownership, management, business purpose, operations, customers, and supervision. LaSalle and Industrial are alter egos.

Between 2001 and 2003, LaSalle used its alter ego Industrial to subcontract carpentry work to non union contractors to evade LaSalle's CBA obligations.

On June 1, 2003, LaSalle again altered its structure by changing the alter ego operation's union signatory from LaSalle to Industrial. This change allows the LaSalle/Industrial alter ego entity to continue to evade its CBA obligations at the same time as it benefits from lucrative contracts that are only available to signatory union contractors by claiming union status on one job through Industrial and non-union status on another job through LaSalle, even though the companies' actual operations are combined.

A. Lasalle and Industrial Always Have Been And Continue to Be Alter Egos

LaSalle's Petition For Writ of Certiorari asks the Court to ignore relevant facts, mischaracterizes the facts in the record, and omits relevant facts to argue that there was no evidence of LaSalle's use of Industrial to avoid its historic collective bargaining agreement obligations or evidence that the Funds were worse off because of the alter ego relationship. The facts clearly show that:

(1) LaSalle formed Industrial at a time when LaSalle was a signatory contractor and was bound to a collective bargaining agreement with the MRCC; (2) LaSalle subcontracted covered carpentry work through its non union alter ego Industrial for over a year and a half prior to LaSalle's "termination" of its collective bargaining agreement with the MRCC;

(3) Neither LaSalle nor Industrial made fringe benefit contributions for the carpentry work LaSalle subcontracted through Industrial for this time period; (4) LaSalle's subcontracting of covered carpentry work through non union carpentry contractor Industrial was a violation of the subcontracting clause of LaSalle's collective bargaining agreement with the MRCC; and (5) In 2003 LaSalle caused Industrial to sign a CBA and sent a letter of "termination" of LaSalle's CBA to the MRCC and "transferred" LaSalle's "union" work to Industrial in an attempt to shield LaSalle from LaSalle's historic fringe benefit obligations while allowing it to continue to work on large "union" jobs through Industrial.

B. Lasalle Used Industrial to Evade its CBA Obligations

LaSalle was incorporated on December 12, 1990. RE No. 42-6, pp. 1-4; ROA pp. 246-249. LaSalle was signatory to the MRCC CBA when Steven Palermo became an owner of LaSalle in 1995. RE 42-13 , p. 9, ROA p. 311, and RE 42-13, p. 3, ROA p. 305. LaSalle does not dispute that it was a signatory with the MRCC prior to its "termination" effective June 1, 2003. RE 37, p. 7; ROA p. 141.

Steven Palermo, while president of LaSalle, originally formed Industrial on August 21, 2001, with the name of Palermo Development, LLC, ("Palermo Development"). RE No. 42-8, p. 1; ROA p. 279. On October 21, 2002, the name Palermo Development was changed to Industrial Contracting, LLC. RE No. 42-9, p. 1; ROA p. 280. Industrial was not signatory to any

union agreements with the MRCC until it signed the 2000-2003 MRCC Independent Agreement on June 1, 2003. RE 37, p. 7; ROA p. 141. LaSalle terminated its CBA with the MRCC effective June 1, 2003. RE No. 37, p. 7; ROA p. 141.

In January of 2002, LaSalle used Industrial, then known as Palermo Development, to sub-contract carpentry work to non-union contractors for the construction of an office building located at 42560 Van Dyke Ave, (the "Adamo Project")[1]. RE No. 42-24, pp. 1-36; ROA pp. 476-511. The sub-contract stated its scope of work as, "carpentry complete pursuant to plans", and is signed on behalf of Palermo Development by "Randy Palermo, VP of Estimating" and witnessed by Penny Holman. RE No. 42-24, p. 2; ROA p. 477. Penny Holman is LaSalle's accounting office manager. RE No. 42-21 p. 2; ROA p. 424. Randy Palermo was and is the VP of Estimating for LaSalle. RE No. 42-12, p. 3; ROA p. 299.

Notwithstanding the above mentioned documents, Randy Palermo testified that he has had no involvement with Palermo Development or Industrial, he has not received any money from Industrial, he does not remember ever having signed any documents on behalf of Palermo Development or Industrial, and all of his income is from LaSalle. RE No. 42-12, p. 4, ROA p. 300. Randy Palermo further testified that he does not know

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1. LaSalle's CBA prohibited it from subcontracting covered carpentry work to a non union subcontractor and required LaSalle to be surety for nonpayment of delinquent fringe benefit contributions for all covered work which has been subcontracted. RE NO. 43-29, p.19; ROA pp. 778.

what Industrial actually does and that he is not familiar with any contact between Industrial and LaSalle. RE No. 42-12, p. 4, ROA p. 300.

Palermo Development sub-contracted with P&J Contracting on January 21, 2002, for carpentry work including roofing, installation of skylights and flashing. RE No. 42-24 pp. 20-23; ROA pp. 495-497. The P&J Contracting sub-contract is stamped, "Received Jan 28, 2002, LaSalle, Inc.," RE No. 42-24 p. 20; ROA p. 495. The P&J subcontract is Number 02001-070500 and is again signed on behalf of Palermo Development by "Randy Palermo, VP of Estimating" and witnessed by Penny Holman. RE No. 42-24 pp. 20-21; ROA pp. 495-496. On October 4, 2002 (invoice incorrectly says 2001) P&J Contracting issued an invoice for sub-contract number 02001-070500 to LaSalle. RE No. 42-25 p.1, ROA p. 512. On March 7, 2002, Chester Jablonski, LaSalle's Controller, issued a Palermo Development check to P&J Contracting for $7,767.00 for the LaSalle invoice. RE No. 42-27 p. 3; ROA p. 529. The date, amount and check number from the Palermo Development check are all recorded on the paid stamp on P&J Contracting's invoice to LaSalle. RE No. 42-25 p.1, ROA p. 512.

On February 6, 2002, John's Lumber issued an invoice to Palermo Development for the Adamo Project (02001-620205) for $24,999.00; this invoice was stamped, "Received FEB 08, 2002, LaSalle, Inc." RE No. 42-25 p.3; ROA p. 514. The job and cost code number on the John's Lumber invoice matches a Palermo Development purchase order authorized by "R.P." (Randy Palermo) dated January 14, 2002; the invoice was paid on February 21, 2002, with a Palermo Development check.

RE No. 42-27 p. 1.; ROA p. 527. John's Lumber issued another invoice to Palermo Development on May 30, 2002, which was also marked, "Received JUN 08, 2002, LaSalle, Inc." RE No. 42-25 p.5; ROA p. 516.

Palermo Development received invoices from Cassino Building and Development, LLC, for the installation of a fence and an invoice from Duro Construction Co., Inc., for site grading which is stamped "Received LaSalle, Inc. RE No. 42-25 pp. 6-7; ROA pp. 517-518. See also RE No. 42-25 p. 9; ROA p. 520.

P&J Contracting, Cassino Building and Development and Duro Construction Co., Inc., are not signatory carpentry contractors with the MRCC and none of them have made any fringe benefit contributions to the MRCC Funds for carpentry work performed by their employees and no one has ever submitted fringe benefit payments for the work performed by their employees. Affidavit of MRCC Fund Investigator/ Collection Coordinator Cipolla. RE No. 42-26, pp. 1-2, ROA pp. 525-526.

LaSalle was able to evade the subcontracting provision of its CBA by having its alter ego Industrial subcontract covered carpentry work to non union carpenters.

C. Lasalle Cannot Evade its CBA Obligations By Changing its Corporate Structure

An alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant*, 417 U.S. 249, 261 (1964)(citing *Southport Petroleum Co.* v. NLRB, 315 U.S. 100, 106 (1942)). LaSalle and Industrial have been alter egos from the date of Industrial's formation. LaSalle used Industrial for a year and a half to evade its CBA obligations prior to its "terminating" its CBA.

LaSalle "terminated" its collective bargaining agreement effective the same day it caused Industrial to become a signatory to the MRCC collective bargaining agreement. RE No. 37-3, p. 1; ROA p. 151; RE No. 37-6, pp. 1-2; ROA pp. 154-155. LaSalle argues that it was a non union contractor when Industrial signed its CBA, however, LaSalle's termination was not effective until June 1, 2003, the same day Industrial's contract became effective. Regardless of La alle's attempt to switch the union face of the alter ego entity, LaSalle and Industrial were alter egos at the time of the switch and they continue to be alter egos. LaSalle, as Industrial's alter ego, is bound to Industrial's June 1, 2003, CBA with the MRCC just as Industrial, as LaSalle's alter ego, was bound to LaSalle's CBA with the MRCC.

LaSalle believes it can avoid the fact that it had been operating Industrial as an alter ego to evade its historic collective bargaining obligations for a year and a half by switching its CBA obligation to Industrial. LaSalle argues, "because both LaSalle and Industrial were non

union companies as of May 31, 2003, LaSalle had no union obligations to 'transfer' or evade.[2] LaSalle believes that this change, which allowed it to retain essentially the same business, can cleanse LaSalle of its history of alter ego operations and allow it to continue its alter ego operations free of challenge by arguing that LaSalle was non union when its alter ego Industrial entered into its collective bargaining agreement.

The alter ego doctrine was created to prevent employers from evading labor laws by merely altering their corporate form. *Southport Petroleum Co.*, 315 U.S. at 106.

LaSalle was avoiding its historic collective bargaining obligations by subcontracting covered work to its non union alter ego. It changed its structure by having its alter ego become the signatory contractor to allow it to escape the unwanted obligation, not by terminating its CBA, but by having its alter ego enter into a new CBA to allow it to benefit from lucrative union carpentry work while at the same time enjoying the benefit of subcontracting non union carpentry work.[3]

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2. This is not true. LaSalle's CBA was in effect through 11:59 pm, May 31, 2003, and Industrial's CBA became effective 12:00 am, June 1, 2003. Termination Letter, Appellee Motion for Summary Judgment, RE No. 37-3, p. 1; ROA p. 151; Industrial CBA, Id., RE No. 37-6, pp. 1-2; ROA pp. 154-155.

3. A benefit no other union signatory contractor would have. The loss of lucrative union carpentry work to a non union carpentry contractor certainly harms the union and the Funds.

LaSalle continued to represent itself to the construction world as a union contractor after its "termination" of its CBA with the MRCC effective June 1, 2003. LaSalle represented itself to general contractor Walbridge Aldinger, ("Walbridge") as a union contractor in 2005 on the DCX World Engine Plant in Dundee, Michigan. Walbridge's project manager for the DCX job, Mickey O'Hearn testified that LaSalle could not bid on the DCX job unless it was a union signatory. RE No. 43-21 pp. 2-3; ROA pp. 657-658. LaSalle executed a contract for the DCX job with Walbridge that required LaSalle to be a union signatory. Paragraph fifteen of the Walbridge contract for the DCX job, which was signed by LaSalle on May 19, 2005, states, "The Subcontractor **shall be signatory** and shall adhere to the terms and conditions of the applicable local Trade Union Labor Agreements.", (emphasis added). RE No. 43-22 p. 10; ROA p. 670. O'Hearn testified that LaSalle told him that they were employing union people. RE No. 43-21 p. 3; ROA p. 658.

LaSalle treated Industrial employees as LaSalle employees on the DCX job. Scott Nemecek, LaSalle's President in 2005, testified that on September 12, 2005, LaSalle submitted a quote for extra work to Walbridge Aldinger for the Daimler Chrysler World Engine project that included hours for self-perform labor and supervision. RE No. 42-11 p. 12; ROA p. 295; RE No. 43-27 pp. 1-2; ROA pp. 753-754. The self performed labor and supervision referenced in the September 12, 2005, quote is for carpentry work that would be performed by Industrial employees. RE No. 42-11 p.13; ROA p. 296.

Scott Nemecek testified that Industrial employees were listed as employees of LaSalle on a union job for General Motors because LaSalle is able to charge its customers more money if the customer believes the work is being self performed by LaSalle. RE No. 42-11 pp. 11-12; ROA pp. 294-295. Scott Nemecek admitted that LaSalle does not treat Industrial as a "true subcontractor" primarily so they can mark up the work with the labor at a higher rate. RE No. 42-11 p. 12; ROA pp. 295. Nemecek testified that the mark up for "self perform" work can be as much as five percent, "twice in some cases, and some contracts don't let the subs mark up anything." RE No. 42-11 p. 12; ROA p. 295.

LaSalle represents itself to the construction world as a union contractor. LaSalle uses Industrial employees for the sole benefit of LaSalle.[4] LaSalle does not treat Industrial as a "true subcontractor" because LaSalle and Industrial are alter egos. There is no distinction between LaSalle and Industrial in their operations or in the way they hold themselves out to the construction industry.

LaSalle cannot be allowed to evade its CBA obligations by switching the signatory company of the LaSalle/Industrial alter ego entity. There is no distinction between LaSalle and Industrial. The LaSalle/Industrial alter ego entity has been operating in the construction industry as a single entity and has only represented itself as a separate entity to the unions and the courts.

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4. At the time the Funds filed their lawsuit, "Industrial contracting had never supplied laborers to any company other than LaSalle." *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d at 313, 316 (6th Cir. 2009).

D. Lasalle and Industrial Are Alter Egos

LaSalle and Industrial have substantially identical ownership, management, business purpose, operations, equipment, customers, and supervision. The facts supporting these alter ego factors are set forth in *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d 313, 315-318 (6th Cir. 2009). The Sixth Circuit notes, "the record is replete with evidence of entanglement between LaSalle and Industrial Contracting. The defendants do not contest those facts on appeal, nor could they, given the documentary nature of the plaintiffs proofs." *Industrial Contracting*, 581 F.3d at 319. The Sixth Circuit referred to the evidence of intermingling of the two companies as a "virtual mountain of evidence." *Industrial Contracting*, 581 F.3d at 317.

LaSalle paid all of the expenses and took all of the profits from the work performed by Industrial from its formation until after the Funds brought their alter ego action in 2005. The only distinctions between LaSalle and Industrial were artificial distinctions the companies chose to tell the unions and their customers to maximize their profit. The record shows Industrial's only reason to exist is to benefit LaSalle:

1) On June 2, 2003, all of Industrial's employees had previously been employed by LaSalle. Deposition of Chester Jablonski[5], RE No. 42-21 p. 22; ROA p. 444;

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5. Chester Jablonski is the CFO of LaSalle and head of operations for Industrial. He was the contact person for both LaSalle and Industrial with the MRCC. RE No. 42-21, p. 8; ROA p. 430; *Id.*, p. 65, lines 16-20. See also RE No. 42-21, p. 17; ROA p. 449.

2) Prior to 2005 Industrial employee expenses such as gas, office supplies, hotel rooms, meals, job tools, and miscellaneous project expenses, were paid directly to the Industrial employees by LaSalle. RE No. 42-21 p. 23; ROA p. 445;

3) Industrial's workers compensation insurance was paid for directly by LaSalle through the beginning of 2005 and is in fact the same policy that covers LaSalle for workers compensation. RE No. 42-21 pp. 18-19; ROA pp. 440-441; RE No. 43-11 pp. 1-2; ROA pp. 596-597.

4) LaSalle paid Industrial's general liability insurance premiums from 2003 through the beginning of 2005. RE No. 42-21 p. 19; ROA p. 441.

5) Industrial employees used LaSalle's Nextel phones. RE No. 42-21 p. 19; ROA p. 441. Industrial did not pay any portion of the cell phone bills until sometime in 2005. RE No. 42-21 p. 12; ROA p. 434.

6) Industrial employees used LaSalle business cards. RE No. 42-21 p. 19; ROA p. 441.

7) From June 2003 to sometime in 2005 LaSalle only paid Industrial for its incurred costs, payroll, fringe benefit obligations, payroll taxes and SBT (single business tax). RE No. 42-21 p. 20; ROA p. 442.;

8) Industrial never made any money until it started charging LaSalle a 3% mark up on its costs sometime in 2005, after the Funds filed the instant suit. RE No. 42-21 p. 20-21; ROA p. 442-443.

LaSalle and Industrial are a classic alter ego operation. Union signatory LaSalle formed non union Industrial to evade LaSalle's CBA obligations. Industrial's only purpose is to assist LaSalle in evading its CBA obligations.

ANALYSIS OF APPLICABLE LAW

A. The Supreme Court Alter Ego Standard

This Court set forth the universally applied alter ego standard in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), a case in which an employer attempted to avoid its obligations to its union employees by making a technical change to its ownership. In determining whether there was an alter ego relationship between the two companies the Court looked to "whether there was a *bona fide* discontinuance and a true change of ownership – or– merely a disguised continuance of the old employer . . ." *Southport Petroleum Co.*, 315 U.S. at 106.

The *Southport Petroleum* Court never addressed whether or not an intent to evade the union obligations was a required element of an alter ego analysis because the intent was obvious from the facts of the case.

Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees, 417 U.S. 249 (1974), relied upon by the Petitioner, is not to the contrary. *Howard Johnson* was a successor case. There was a bona fide purchase and sale, an arm's length relinquishment of control between two independent entities. *Southport Petroleum* was an alter ego case

because of the disguised continuance of the original employer. As the *Howard Johnson* Court recognized, "it is important to emphasize that this is not a case where the successor corporation is the alter ego of the successor company, where it is 'merely a disguised continuance of the old employer'." *Howard Johnson Co.*, 417 U.S. at 261 (citing to *Southport Petroleum Co.* 315 U.S. at 106.)

The difference between successor and alter ego is important. A successor, "may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of the collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." *Howard Johnson Co.*, 417 U.S. at 261 (citing *Rohlik, Inc.*, 145 N.L.R.B. 1236, 1242 n. 15 (1964); *General Extrusion Co.*, 121 N.L.R.B. 413, 414 (1955); *Slater System Maryland Inc.*, 134 N.L.R.B. 865, 866 (1961); *Matter of ILWU (Juneau Spruce)*, 82 N.L.R.B. 650, 658-659, enforced, 189 F.2d 177 (CA 9 1951), aff'd on other grounds, 342 U.S. 237 (1952).) An alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co.*, 417 U.S. at 261 (citing to *Southport Petroleum Co.*, 315 U.S. at 106.)

It is also important to note that the alter ego doctrine is not limited to successor companies. The alter ego doctrine is also commonly applied in "double breasted"situations where, "coexisting employers performing the same work are in fact one business, separated only in form." *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 311, 336 (6th Cir. 1990); *See also Massachusetts Carpenters Central Collection*

Agency v. Belmont Concrete Corporation and Alger Construction Corporation, 139 F.3d 304 (1st Cir 1998) (applying the alter ego test to parallel companies); *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d 313 (6th Cir. 2009). (LaSalle and Industrial are a double breasted alter ego); *Thomas Pearson, et al. V Component Technology*, 247 F.3d 471, 486 (3rd Cir. 2001)(discussing double breasted operations used to avoid CBA obligations); *Local 282 v. Sandimo Materials*, et al., 250 F.2d 120 (2nd Cir. 2001)(Ordering trial of double breasted operations as possible alter ego); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, et al., 48 F.3d 1465, 1469-1470 (9th Cir. 1994)(Discussing alter ego theory when companies try to avoid CBA obligations with double breasted operations); *Pipefitters v. Waldo R., Inc.*, et al, 872 F.2d 815 (8th Cir 1989)(Double breasted operation is alter ego); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531 (4th Cir. 1985)(Discussing double breasted operation as possible alter ego); *NLRB v Leonard Hebert*, 696 F.2d 1120 (5th Cir. 1993)(Double breasted operation can be alter ego).

B. Lasalle and Industrial Are Alter Egos Under the *Southport Petroleum* Standard

LaSalle and Industrial are clearly alter egos based upon the *Southport Petroleum Co.* standard. There is a "virtual mountain of evidence" establishing the intermingling of LaSalle and Industrial. *Industrial Contracting, LLC*, 581 F.3d at 317. The creation of non union Industrial was a change in structure of the employing entity that was used to avoid LaSalle's collective bargaining obligations. This change did not

involve any change in the management or ownership of LaSalle as LaSalle and Industrial had substantially identical ownership and management.

At the time Industrial was created, LaSalle was owned by three brothers, 84.96% by Steven Palermo, 7.52% by Randy Palermo, and 7.52% by Gary Palermo. RE No. 42-7 p. 11; ROA p. 260. Industrial was owned by Steven Palermo and Randy Palermo from formation on August 21, 2001, to January 1, 2004. RE No. 42-10 pp. 1-2; ROA pp. 282-283; *See also* RE No. 42-9 pp. 1-2; ROA pp. 280-281. On January 1, 2004, all of Steve Palermo's 50% interest in Industrial was sold to his brother in law Chester Jablonski for $334.50 and 1.8% of Randy Palermo's 50% interest was sold to Chester Jablonski for $6.00. RE No. 42-10 pp. 1-2; ROA pp. 282-283.

The Sixth Circuit summarized the identical management of LaSalle and Industrial,

> In addition to his majority interest in Industrial Contracting, Jablonski was LaSalle's chief financial officer and had previously served as its vice president, secretary, and treasurer. He managed the day-to-day operations for both Industrial Contracting and LaSalle, and he acted as the contact with the union for both companies. Jablonski testified that he had the authority to sign Steven Palermo's signature on LaSalle documents for "pretty much whatever I need his signature on."

Industrial Contracting, LLC, 581 F.3d at 316.

In 2003 LaSalle was aware that it was an obvious alter ego of Industrial and needed to change its structure again to better disguise its alter ego operations. It changed its structure by causing its alter ego to become the signatory contractor to allow it to escape its unwanted subcontracting obligations, not by terminating its CBA, but by having its alter ego enter into a new CBA to allow it to benefit from lucrative union carpentry work through Industrial while at the same time LaSalle could enjoy the benefit of subcontracting non union work.[6] This change did not involve any change in ownership or management of the LaSalle/Industrial alter ego operation.

C. Circuit Courts Consistently Apply *Southport Petroleum* Standard

The Circuit Courts have consistently applied the *Southport Petroleum* standard in alter ego cases. The Circuits have developed various factors to review when determining whether or not two companies are alter egos. Most of these factors are based upon "single employer" factors used by the National Labor Relations Board ("NLRB"). Each Circuit uses these factors to determine whether or not there has been a change in corporate form frequently used to avoid the effect of labor laws without any substantial change in ownership or management.

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6. This change ignored the fact that LaSalle and Industrial were alter egos for two years prior to this new disguised continuance of the alter ego operation. Once an alter ego always an alter ego.

1. Flexible Crawford Door Standard applied by 1st, 2nd, 3rd, 6th, 11th, and DC Circuits

The Sixth Circuit, like all Circuits, looks to the circumstances surrounding a change in corporate form to determine, "whether the change resulted in a '*bona fide* discontinuance and a true change of ownership' or was merely 'a disguised continuance of an old employer.'" *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), citing *Southport Petroleum Co. v. NLRB*, 315 U.S. at 106. To determine whether the change resulted in a bona fide discontinuance and a true change of ownership or a disguised continuance of an old employer, the Sixth Circuit,

> and other circuit courts have recognized that factors relevant to finding alter ego status include 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981), citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Goodman Piping Products Co., Inc., v NLRB*, 741 F.2d 10, 12 (2nd Cir. 1984); *NLRB v Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir. 1983); *NLRB v Al Bryant, Inc.*, 711 F.2d 543, 553-54 (3rd Cir. 1983), *Cert denied*, 464 U.S. 1039 (1984); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 226-27 (D.C. Cir. 1980).

Allcoast Transfer, Inc., 780 F.2d at 579. This standard is commonly referred to as the *Crawford Door* standard.

Upon analyzing opinions of its sister circuits, the Sixth Circuit concluded that, "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider, along with the well established factors . . ." *Allcoast Transfer, Inc.*, 780 F.2d at 581.

The Sixth Circuit recognizes that an alter ego analysis should be flexible and, "under a flexible approach, no one element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Allcoast Transfer, Inc.*, 780 F.2d at 582.

This same flexible approach is taken by the First, Second, Third, Eleventh, and the D.C. Circuits. Each of these Circuits apply the *Crawford Door* factors and consider the intent of the parties in creating the second company as an additional factor. None of these Circuits believe express evidence of wrongful intent is a prerequisite to the imposition of the alter ego doctrine. See *Massachusetts Carpenters Central Collection Agency v. Belmont Concrete Corporation and Alger Construction Corporation*, 139 F.3d 304 (1st Cir. 1998) (applying the alter ego test to parallel companies); *N.L.R.B. v Hospital San Rafael, Inc.*, 42 F.3d 45, 354 (1st Cir. 1994); *Goodman Piping Products, Inc. v. National Labor Relations Board*, 741 F.2d 10 (2nd Cir. 1984);*Trafford Distribution Center v. National Labor Relations Board; National Labor Relations Board v. Liberty Source W, LLC and its Alter Ego, Trafford Distribution Center*, 478 F.3d 172, 179 (3rd Cir. 2006); *Board of Trustees, Container Mechanics Welfare/*

Pension Fund v Universal Enterprises, Inc., 751 F.2d 1177, 1184 (11th Cir. 1985); *Fugazy Continental Corporation v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

As explained by the Sixth Circuit, LaSalle and Industrial are alter egos when the flexible *Crawford Door* standard is applied. *Industrial Contracting, Supra.*

2. Fourth Circuit's Reasonably Foreseeable Test

When business operations are transferred, the Fourth Circuit looks to see,

> whether substantially the same entity controls both the old and the new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations. . . . To the extent that obtaining the benefit was a motive for the transfer, or was a reasonably foreseeable effect, the result represents a disguised continuance of the old employer.

Denzil S. Alkire,v. National Labor Relations Board, 716 F.2d 1014,1020 (4th Cir. 1983). The Fourth Circuit does not require a finding of intent to evade an obligation. The Court foresees that there will be instances where the employer intended to evade an obligation and that there "will be cases where the employer intended no evasiveness or subterfuge, but

merely seeks what it believes is a legitimate benefit offered by a strategic business reorganization". *Denzil S. Alkire*, 716 F.2d at 1020-1021.

Nevertheless, the effect is the same in both situations: the employer obtains an economic benefit at the expense of statutory employee rights, upsetting and undermining the balance of power between labor and management created to reflect national labor policy. By eliminating the benefit derived from transferring operations to a separate entity, the alter ego doctrine redresses this economic imbalance. If the employer obtains no benefit from the transfer, however, and none was reasonably foreseeable, nothing in labor policy justifies preventing it from arranging its affairs as it sees fit. *Denzil S. Alkire*, 716 F.2d at 1021.

"The imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws." *National Labor Relations Board v. Seafarers International Union of North America*, 819 F.2d 439, 445 (4th Cir. 1987).

LaSalle and Industrial would be alter egos under the Fourth Circuit's analysis. It is clear from the evidence presented to the Sixth Circuit that the same entity controls both LaSalle and Industrial and that LaSalle created Industrial to avoid the subcontracting provisions of its CBA. The evidence also shows that when LaSalle caused Industrial to execute a CBA the same day it terminated its CBA it benefitted from being able to subcontract non union carpentry work while still being able to work on union jobs at the same time.

3. Tenth Circuit's Flexible Approach

The Tenth Circuit does not require a finding of anti union sentiment but believes evidence of such anti union sentiment is germane. *NLRB v Tricor Products, Inc.*, 636 F.2d 266, 270 (10th Cir. 1980). The Tenth Circuit has no hard-and-fast rule,

> If an employer makes changes in its business operation to deliberately get rid of the union, the employer is more likely to be an alter ego. If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor to the first.

Tricor Products, Inc., 636 F.2d at 270.

The Tenth Circuit also considers the continuity of the work force and the relationship, if any, between the management of the old company and that of the new company. *Tricor Products, Inc.*, 636 F.2d at 270.

LaSalle and Industrial would be considered alter egos under the Tenth Circuit's approach.

4. Modified Crawford Door or Single Employer Factors in 5th, 7th, 8th, and 9th Circuits

The 5th, 7th, 8th, and 9th Circuits look to first establish either the *Crawford Door* factors or the NLRB's single employer factors before looking to see if the structure was changed as a sham to evade labor obligations.

a. Fifth Circuit

The Fifth Circuit has adopted a modified *Crawford Door* standard. *J. Vallery Electric, Inc., v. National Labor Relations Board*, 337 F.3d 446 (5th Cir. 2003). The court looks to two inquiries when determining whether two companies are alter egos:

> First, the Board must determine 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.' Second, it must gauge whether there was an unlawful motive behind the creation of the new business entity, determining whether there was a 'disguised continuance' or 'attempt to avoid obligations of [an existing] collective bargaining agreement through a sham transaction or technical change in operations.'

J. Vallery Electric, Inc., 337 F.3d at 451, citing *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507 5th Cir. 1982).

J. Vallery Electric found that there is substantial evidence of an unlawful motive in the creation of the second company based upon evidence of the transfer of real and personal property as well as stock without any consideration. This evidence, "shows that there was not even a pretense of an arm's length relationship between JVE, VE, and the principals of each during the formation of JVE." *J. Vallery Electric, Inc.*, 337 F.3d at 452.

b. Seventh Circuit

The Seventh Circuit requires a finding of the factors necessary to support "single employer" liability (interrelationship of operations, common management, centralized control of labor relations, and common ownership) and a finding that, "the second corporation is a 'disguised continuance' of the employing enterprise, resulting in the evasion of the employer's obligations under the labor laws." *Trustees of IBEW Local 701 v. Favia Electric Company, Incorporated*, 995 F.2d at 788 (7th Cir. 1993). The "single employer" analysis is flexible. The Court stated, "Meeting all of the elements of the single employer doctrine is not essential to a finding that the alter ego doctrine applies, however." *Favia Electric Company, Incorporated*, 995 F.2d at 789.

> What is essential for the application of the alter ego doctrine, though, is a finding of "the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets. In sum, unlawful motive or intent are critical inquiries in an alter ego analysis . . ."

Favia Electric Company, Incorporated, 995 F.2d at 789 (citing *Int'l Union of Operating Engineers v. Centor Contractors*, 831 F.2d 1309, 1319 (7th Cir. 1987)).

c. Eighth Circuit

For the Eighth Circuit, "the essential inquiry under the alter ego analysis is 'whether there was a bona fide discontinuance and a true change of ownership * * * or merely a disguised continuance of the old employer. *Iowa Express Distribution, Inc, v National Labor Relations Board*, 739 F.2d 1305 (8th Cir. 1984) (citing *Southport Petroleum Co.*, 315 U.S. at 106. The Eighth Circuit looks to determine whether there is substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. *Iowa Express Distribution, Inc*, 739 F.2d at 1310 (Citing to *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc*, 690 F.2d 489, 507 (5th Cir. 1982). Another factor considered by the Eighth Circuit is whether there is a substantial continuity of the work force from the union to the non-union employer. *Iowa Express Distribution, Inc*, 739 F.2d at 1310 (Citing to *Carpenters Local Union No. 1846*, 690 F.2d at 507. The focus of the alter ego doctrine in the Eighth Circuit is, "on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligation of a collective bargaining agreement, such as through a sham transfer of assets." *Iowa Express Distribution, Inc*,739 F.2d at 1310-1311. (Citations omitted). "Unlawful motive or intent are critical inquiries in an alter ego analysis." *Iowa Express Distribution, Inc*, 739 F.2d at 1311. (Citations omitted).

The Eighth Circuit noted, when discussing the 6th Circuit's warning that requiring intent could hinder the goals of the alter ego doctrine, "that an employer who desired to avoid union obligations might be tempted to

circumvent the doctrine by altering the corporations structure based on some legitimate business reason, retaining essentially the same business and utilizing the change to escape the unwanted obligations." *Allcoast Transfer, Inc.*, 780 F.2d at 582, the mere existence of 'some legitimate business reason' for a change in corporate organization should not alone prevent a finding of alter ego status. *Crest Tankers, Inc., v. National Maritime Union of America*, 796 F.2d 234, 238 fn. 2 (8th Cir. 1986).

d. Ninth Circuit

The Ninth Circuit requires a threshold showing that the two firms were a single employer. *UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. v.Nor-Cal Plumbing Inc.*, 48 F.3d 1465 (9th Cir. 1994). Single employer factors are,

> (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. See *NLRB v Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). No one factor is controlling nor need all criteria be present. See *id.* The most important factor is centralized control of labor relations, which can be demonstrated by either showing common control of day-to-day labor matters, see *J.M. Tanaka Constr., Inc., v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982), or by showing that the person in charge of the union company's labor relations made the

> decision that the second company would be non-union, See *Don Burgess*, 596 F.2d at 385-86.

UA Local 343, 48 F.3d at 1471.

To prevail on an alter ego claim in the Ninth Circuit a plaintiff must first make the threshold showing that the two entities were a single employer and then the plaintiff must prove that the second company was being used in a sham effort to avoid collective bargaining obligations rather than for the pursuit of legitimate business objectives untainted by "union animous." *UA Local 343*, 48 F.3d at 1470.

e. LaSalle/Industrial Are Alter Egos in the 5th, 7th, 8th, and 9th Circuits

The Fifth, Seventh, Eighth, and Ninth Circuits would find intent to evade union obligations in the LaSalle/Industrial operations. There was no arms length relationship between LaSalle and Industrial. For three years LaSalle paid all of Industrial's expenses and Industrial provided nothing in return other than a corporate shell to evade LaSalle's CBA obligations. To this day, Industrial has never operated as a "stand alone" business entity. When LaSalle and Industrial changed the signatory entity from LaSalle to Industrial, Industrial used LaSalle as a vehicle to evade its CBA obligations. In both instances the non signatory contractor was used to subcontract covered work to non union contractors in violation of the existing collective bargaining agreement. All of the Circuits would find that the evidence of the creation and operation of the

LaSalle/Industrial entity was a disguised continuance of the entity subject to the collective bargaining agreement.

5. Intent

All of the Circuits include a review of intent in their analysis. Intent can be expressed by the parties or inferred from their actions. In order to have a disguised continuance there is an inference of intent. This intent can be inferred from an examination of the factors considered by each Circuit. Inferred intent is best expressed by the Sixth Circuit in *Allcoast Transfer*. After reviewing the *Crawford Door* factors, the Court found that there was,

> substantial evidence to support the Board's finding that Ward Moving is the alter ego of A.E. Ward without a determination of Harris' intent. When the circumstances so strongly support a finding of alter ego status, as they do here, the Board can properly weigh all of the factors and infer that the employer intended to evade union obligations. An inquiry into employer intent may be appropriate in other situations involving application of the alter ego doctrine but here it is simply not necessary.

Allcoast Transfer, Inc., 780 F.2d at 583. The Sixth Circuit does not require a finding of express intent as a prerequisite to application of the alter ego doctrine because intent is so easily disguised,

> the doctrine was developed to prevent employers from evading obligations under the Act by merely changing or altering their corporate form. If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape unwanted obligations.

Allcoast Transfer, Inc., 780 F.2d at 582.

While the Eighth Circuit states, " Unlawful motive or intent are critical inquiries in an alter ego analysis." *Iowa Express Distribution, Inc.*, 739 F.2d at 1311. (Citations omitted); it also agrees with the Sixth Circuit that it is easy for an employer to hide it's intent behind a legitimate business reason for a change. As a result the Eighth Circuit will not prevent a finding of alter ego status because of the existence of "some legitimate business reason" for a change in corporate organization. *Crest Tankers, Inc.*, 796 F.2d at 238 fn. 2.

The Fifth Circuit looks to gauge unlawful motive behind the creation of the new business. *J. Vallery Electric, Inc.*, 337 F.3d at 451. It found the absence of an arms length transaction or arms length relationship between the companies would qualify as unlawful motive. *J. Vallery Electric, Inc.*, 337 F.3d at 452. The Circuits that do not require a finding of unlawful motive or intent would, however, find an alter ego in a situation where there is an absence of an arms length transaction

or relationship between the companies. The examination of the factors which may or may not include intent would lead to an alter ego finding. The evidence of the lack of an arms length transaction or relationship could be considered evidence of express intent or could be circumstantial intent based upon the factors considered by the particular Court.

The Seventh Circuit believes a finding of unlawful motive or intent are critical inquiries in an alter ego analysis and would find such motive or intent from the existence of a sham transfer of assets. *Favia Electric Company, Incorporated*, 995 F.2d at 789.

In the Ninth Circuit a plaintiff must prove that the second company was being used in a sham effort to avoid collective bargaining obligations rather than for the pursuit of legitimate business objectives untainted by "union animus." *UA Local 343.*, 48 F.3d at 1470.

All of the Circuits consider intent whether it be express or inferred.

CONCLUSION

All of the Circuit Courts apply the *Southport Petroleum* standard. Each Circuit Court reviews various factors to determine whether an employer attempted to avoid its labor obligations by making a technical change to its ownership. The Courts then determine whether there is a disguised continuance of the older employer or a *bona fide* change in ownership. Each Circuit Court looks at the facts surrounding the creation of a new company or second company to determine whether it was created or used to evade labor obligations. All of the Circuit Courts will find an alter ego if a review of the facts show that there was not a significant change in ownership or management and one of the companies is being used to avoid the labor obligations of the other company. It does not matter whether the intent to evade the labor obligation was express or could be inferred from the facts of the case. When direct or circumstantial evidence differs, the Courts emphasize different evidence, but where the factors are met, alter ego status is found. The Sixth Circuit's decision should be upheld and the Petition for Certiorari should be denied.

Respectfully submitted,

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